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English Edition

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# PRESENTATION



It is a great pleasure for us to present the 12 issue of the Sur Journal. As previously announced, this edition is the beginning of our collaboration with **Carlos Chagas Foundation (FCC)** that will support the Sur Journal in 2010 and 2011. We would like to thank FCC for this support, which has guaranteed the maintenance of the printed version of the Journal.

This issue of Sur Journal is edited in collaboration with Amnesty International.\* On the occasion of the UN High-level Summit on the Millennium Development Goals (MDGs) in September 2010, this issue of Sur Journal focuses on the MDGs framework in relation to human rights standards. We are thankful to Salil Shetty, Amnesty International Secretary General, who prepared an introduction to this discussion. The first article of the dossier, also by Amnesty International, **Combating Exclusion: Why Human Rights Are Essential for the MDGs**, stresses the importance of ensuring that all efforts towards fulfilling all the MDGs are fully consistent with human rights standards, and that non-discrimination, gender equality, participation and accountability must be at the heart of all efforts to meet the MDGs.

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\* **Disclaimer.** With the exception of the foreword and 'Combating exclusion: Why human rights are essential for the MDGs', the opinions expressed in this collection of articles are those of the authors and do not necessarily reflect Amnesty International policy.

**Reflections on the Role of the United Nations Permanent Forum on Indigenous Issues in Relation to the Millennium Development Goals**, by Victoria Tauli-Corpuz, examines the relationship of the MDGs with the protection, respect and fulfillment of indigenous peoples' rights as contained in the UN Declaration on the Rights of Indigenous Peoples.

Alicia Ely Yamin, in **Toward Transformative Accountability: Applying a Rights-based Approach to Fulfill Maternal Health Obligations**, examines how accountability for fulfilling the right to maternal health should be understood if we seek to transform the discourse of rights into practical health policy and programming.

Still addressing the issue of MDGs, Sarah Zaidi, in **Millennium Development Goal 6 and the Right to Health: Conflictual or Complementary?**, explores how MDGs fit within an international law framework, and how MDG 6 on combating HIV/AIDS, malaria, and tuberculosis can be integrated with the right to health.

This issue also features an article by Marcos A. Orellana on the relationship between climate change and the MDGs, looking into linkages between climate change, the right to development and international cooperation, in **Climate Change and The Millennium Development Goals: The Right to Development, International Cooperation and the Clean Development Mechanism**.

We hope that this issue of the Sur Journal will call the attention of human rights activists, civil society organisations and academics to the relevance of the MDGs for the human rights agenda. The articles included in this edition of the Sur Journal show not only a critique of the MDGs from a human rights perspective, but also several positive proposals on how to integrate human rights into the MDGs.

Two articles discuss the impact of corporations on human rights. The first, by Lindiwe Knutson (**Aliens, Apartheid and US courts: Is the Right of Apartheid Victims to Claim Reparations from Multinational Corporations at last Recognized?**), analyses several cases brought before U.S. courts that have alleged that major multinational corporations were complicit in and benefited from human rights violations committed by agents of foreign governments. The article examines the most recent decision of *In re South African Apartheid Litigation* (commonly referred to as the *Khulumani* case) in the Southern District Court of New York.

The second article, by David Bilchitz (**The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?**), seeks to analyze the John Ruggie framework in light of international human rights law and argues that Ruggie's conception of the nature of corporate obligations is mistaken: corporations should

not only be required to avoid harm to fundamental rights; they must also be required to contribute actively to the realization of such rights.

There are two more articles in this issue. The article by Fernando Basch, Leonardo Filippini, Ana Laya, Mariano Nino, Felicitas Rossi and Bárbara Schreiber, examines the functioning of the Inter-American System of Human Rights Protection in, **The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions**. The article presents the results of a quantitative study focused on the degree of compliance with decisions adopted within the framework of the system of petitions of the American Convention on Human Rights (ACHR).

Finally, Richard Bourne's paper, **The Commonwealth of Nations: Intergovernmental and Nongovernmental Strategies for the Protection of Human Rights in a Post-colonial Association**, discusses how membership rules for the Commonwealth became crucial in defining it as an association of democracies and, more cautiously, as committed to human rights guarantees for citizens.

We would like to thank Amnesty International's team for its contribution. Their timely input in the selection and edition of articles has been vital.

The editors.

## FOREWORD



Amnesty International's recently released report, *Insecurity and indignity: Women's experiences in the slums of Nairobi, Kenya* (July 2010) documents how women and girls living in informal settlements are particularly affected by lack of adequate access to sanitation facilities for toilets and bathing. Many of the women told Amnesty International that they have experienced different forms of physical, sexual and psychological violence, and live under the ever-present threat of violence. The lack of effective policing and due diligence by the government to prevent, investigate or punish gender-based violence and provide an effective remedy to women and girls results in a situation where violence goes largely unpunished.

We also recorded testimonies from a high number of women and girls who have experienced rape and other forms of violence directly as a result of their attempt to find or walk to a toilet or latrine some distance away from their houses. Women's experiences show that lack of adequate access to sanitation facilities and the lack of public security services significantly

contribute to the incidence and persistence of gender-based violence.

Yet, Kenya has committed to the international Millennium Development Goal (MDG) target on sanitation to reduce by half, between 1990 and 2015, the proportion of people without sustainable access to basic sanitation. The country adopted water and sanitation policies that aim to fulfill MDG targets and also the rights to water and sanitation. These policies do reflect many human rights principles. But our research shows that there are still key gaps between Kenya's MDG policies and ensuring consistency with Kenya's international human rights obligations. It also starkly illustrates how the MDG policies of governments cannot ignore gender-based violence or the specific barriers faced by women and girls living in informal settlements in accessing even basic levels of sanitation.

This is why the discussion in this issue of *Sur - International Journal on Human Rights* is so important and timely. These concerns are not unique to Kenya and around the world there are examples

illustrating how MDG efforts are most effective when they address underlying human rights issues and are truly targeted at groups facing discrimination and marginalization.

In September 2010, UN Member States will meet to agree an action plan to ensure the realization of the MDGs by 2015. With only five years left to go, it is more important now than ever that human rights are put at the centre of this action plan, in order to make the MDG framework effective for the billions striving to free themselves from poverty and to claim their rights.

The articles in this issue focus on a range of issues related to the MDGs. They illustrate the gap between the current MDG targets and existing requirements under international human rights law. They also briefly outline some of the essential elements that must be incorporated into any revised or new global framework to address poverty after 2015. I hope it will contribute to discussions on the relationship between human rights and the MDGs and be a useful resource for human

rights practitioners and others who are concerned with these issues.

Another great challenge facing governments across the world is human rights abuses committed by or in complicity with corporations. Two articles in this issue address some of the challenges as well as opportunities related to human rights in the context of corporate activities.

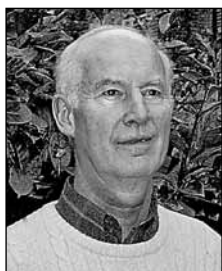
The issue also includes two general articles, which examine the role of the Inter-American System of Human Rights and the Commonwealth of Nations in the promotion and protection of human rights.

I had the privilege of speaking at the International Human Rights Colloquium, organized by Conectas, in 2004 and of contributing to the second issue of the SUR journal. I am extremely pleased to have the chance to collaborate again with Conectas and that they agreed to produce this edition of SUR jointly with Amnesty International.

We would like to thank them for giving us this opportunity and also thank all the authors who have contributed to this issue.

I hope you enjoy reading it.

Salil Shetty  
Amnesty International  
Secretary General



RICHARD BOURNE

Richard Bourne is Secretary of the Ramphal Centre Committee which is responsible for the Ramphal Commission on Migration and Development. He was the voluntary coordinator and then first Director of the Commonwealth Human Rights Initiative (1990-91) and arranged for the transfer of its headquarters from London to New Delhi in 1993; he concluded a study of the Initiative as part

of the Economic and Social Research Council's Non-Governmental Public Action programme in 2007. He was Head of the Commonwealth Policy Studies Unit, London University, 1999-2005 and is currently Senior Research Fellow, Institute of Commonwealth Studies, London University. He was for 16 years chairman of Survival International, the NGO concerned for the rights of Indigenous and tribal peoples. He currently chairs the board of the Round Table, the Commonwealth international affairs journal. He has written several books, including "Lula of Brazil, the story so far" (University of California Press and Zed Books, 2008, Geração Editorial, 2009) and edited "Shridath Ramphal: the Commonwealth and the World", Hansib, 2008. He is currently working on a contemporary history of Zimbabwe, for publication in 2011.

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## ABSTRACT

Is there a role for machinery to promote and protect human rights which is neither universal, nor regional? The case of the Commonwealth of Nations, which originated in the British Empire but where the majority of members are now developing states, offers an insight into possibilities at both intergovernmental and nongovernmental levels. This article focuses on the way in which rules of membership for the Commonwealth have come to play a decisive part in defining it as an association of democracies and, more cautiously, as committed to human rights guarantees for citizens. The progress has been uneven, driven by political crises, and limited by the small resources available to an intergovernmental Secretariat. Simultaneously, the Commonwealth Human Rights Initiative, a strong nongovernmental body, based in New Delhi and initially launched as a coalition of London-based Commonwealth associations, has been coordinating international pressure on Commonwealth governments to live up to their declarations. It has also been running programmes of its own for the right to information, and accountable policing.

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## KEYWORDS

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# THE COMMONWEALTH OF NATIONS: INTERGOVERNMENTAL AND NONGOVERNMENTAL STRATEGIES FOR THE PROTECTION OF HUMAN RIGHTS IN A POST-COLONIAL ASSOCIATION

Richard Bourne

The Commonwealth of Nations now consists of 54 states.<sup>1</sup> Its origins lie in the former British Empire, which expired in the 1960s.<sup>2</sup> It was not established by a treaty, but by a series of hortatory declarations of principle, of which the most significant were made in Singapore in 1971 and in Harare in 1991; these were combined together in a new statement from the Port of Spain summit of Commonwealth leaders in November 2009. Today, most would argue that its main political and economic aims lie in the fields of development, and governance. But it has gradually come to assume significance for the promotion and protection of the human rights of its some 2,000 million citizens (over half of whom live in just one member state, India; more than 30 of its member states have populations of less than 1.5 million). This article aims to describe how a voluntary grouping, which is neither regional nor universal, is playing a role in this field, and how there intergovernmental and nongovernmental actors have been interacting.

## 1 The intergovernmental Commonwealth

The increasing involvement in human rights of the intergovernmental Commonwealth, whose political and economic secretariat is based in a former royal palace in London, has been slow and cautious. This secretariat was established in 1965, a year before the two UN Covenants on political and civil rights and economic, social and cultural rights were adopted. The Commonwealth matured as a post-colonial association simultaneously with two events. First, it coincided with the arrival of a developing states majority in the UN. Second, an international Cold War compromise, under which both the civil and political

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*Notes to this text start on page 52.*

rights dear to the West and the economic and social rights promoted by the Soviet bloc, achieved parallel recognition with the maturing Commonwealth.

In the Commonwealth, there were furious rows between developing states and the United Kingdom over racism in Southern Africa; Nigeria and Tanzania threatened at various times to withdraw over what they saw as British inaction after Ian Smith's white-led Rhodesia declared unilateral independence in 1965. But it was in 1977, at a London summit, that the Commonwealth first took a stand for human rights. Idi Amin, the barbarous dictator of Uganda, had threatened to attend. The cruelties of his regime had been widely reported, and diplomatic efforts had been exerted to prevent his arrival. The conference communiqué made plain the Commonwealth's abhorrence.

But the Commonwealth Secretariat had no capacity to fulfil a human rights mandate. The collegial air about Commonwealth leaders, meeting every two years from countries where there were many human rights abuses, was not sympathetic to finger-pointing between them.<sup>3</sup> Nonetheless, the small West African state of The Gambia proposed that there should be a full-blown Commonwealth Human Rights Commission, with judicial powers, prior to the Lusaka summit in 1979, which was largely concerned to end the war in Rhodesia (now Zimbabwe) and which issued a declaration against racism. This scheme contrasted with the fact that newly independent states had set up their own judiciaries and were not keen on surrendering authority in such a sensitive and vulnerable area.

The Gambia's proposal was filtered through a process which included consideration by Commonwealth Law Ministers, and was drastically watered down. In 1983, at a summit in Melbourne, the Commonwealth Secretariat was authorised to set up a small Human Rights Unit (HRU), whose task was to promote human rights. It was prohibited from performing any role in investigation or active protection. It was seen as assisting governments in their own efforts for promoting human rights. Secretariat staff at the time argued that their main rights-related work lay in the campaign to end discriminatory apartheid in South Africa, and the struggle for the development of the poorest countries and the improvement of the living conditions of its citizens.<sup>4</sup> Many governments were uncomfortable with any Commonwealth role which could highlight the dissatisfaction and abuse of their citizens, aid oppositions in their own countries, and give rise to bad publicity.

The official Commonwealth made little progress for human rights in the 1980s. In one year the HRU had no staff at all, and was seen as a football in a funding battle between the Secretariat and the governments which provided most of its finance – the United Kingdom, Canada and Australia. However, this led to dissatisfaction among qualified Commonwealth nongovernmental bodies, which banded together to establish a Commonwealth Human Rights Initiative (the CHRI, see below). They were concerned by apparent inaction, which was giving the apartheid propagandists a field day. White South Africans tried to divert attacks on systemic inequality in their country by pointing to dictatorships and military regimes elsewhere in the Commonwealth, and especially in Africa.<sup>5</sup>

The context changed drastically after the fall of the Berlin Wall in 1989, the collapse of the Soviet bloc, as well as after the release of Nelson Mandela in

1990, which led to a negotiated end to South African apartheid. There was a brief spasm of international optimism for human rights, with a build-up to the UN conference in Vienna of 1993, and a switch to a multiparty system in countries like Zambia, where Kenneth Kaunda's one-party government of over 20 years was voted out of office in 1991.

The CHRI was at the forefront of a campaign to make the Commonwealth a more powerful tool for human rights. At the Harare summit of 1991 it sought an independent Commonwealth Human Rights Commission, a special declaration for human rights, and a substantial fund for the Secretariat's HRU. None of these initiatives were achieved. Nongovernmental activists were bitterly disappointed. What the Harare conference did agree upon, however, was more modest, what became known as the Harare Principles. In reviewing and renewing the positions taken at Singapore in 1971, the heads of government agreed to uphold just and accountable government, the rule of law, and fundamental human rights. Their definition of democracy, the type of government they wished to support, was a little evasive, as it had to suit "national circumstances." Critics thought this expression could cover one-party government, guided democracy and other systems which limited the freedom of peoples to change their rulers. Subsequently the then Secretary-General, Chief Emeka Anyaoku, has explained that the wording was designed to cover the varied presidential, parliamentary and federal systems which maintain a fully democratic spirit.

The Singapore Declaration contained fine if vague sentiments, but they had been widely ignored. In paragraph 6 of that declaration the leaders had stated, "We believe in the liberty of the individual, in equal rights for all citizens regardless of race, colour, creed or political belief, and in their inalienable right to participate by means of free and democratic political processes in framing the society in which they live. We therefore strive to promote in each of our countries those representative institutions and guarantees for personal freedom under the law which are our common heritage."

Nonetheless, the mid-nineties saw a major development for human rights in the Commonwealth, precipitated by a political crisis. The Nigerian military dictatorship, presided over by General Sani Abacha, caused an international furore in 1995 when it executed Ken Saro-Wiwa and other Ogoni leaders at the start of the Commonwealth summit in Auckland. Critics already doubted how a military regime, repressing all opposition, could continue to belong to an association professing the Harare Declaration. These executions, immediately denounced by President Mandela of South Africa and John Major, the British Prime Minister, seemed a snub to the association and to leaders which had appealed to General Abacha for clemency.

Mandela urged that the Nigerian regime be immediately expelled from the Commonwealth. The situation was fraught for the position of the current Secretary-General, Chief Anyaoku, who was himself Nigerian. If his country had been expelled he would almost certainly have had to resign. However, Chief Anyaoku and his staff, along with key governments, had already been considering how to provide the Harare Principles with teeth. He put forward specific proposals, as

did the British government. Four years after the Harare Declaration, it was being rebranded as a pioneering document for human rights.

The Commonwealth leaders came up with a Millbrook programme, whose main feature was that governments in breach of the Harare rules could be suspended by a new committee of Foreign Ministers, called the Commonwealth Ministerial Action Group (CMAG). The chief cause for suspension would be the unconstitutional overthrow of an elected civilian government. It was a move not precisely in favour of human rights, but against military coups. CMAG would then keep the suspended government under review, until it could recommend the return of the government to full membership after a transition to an elected administration. Immediately, after the Auckland conference, three West African states ruled by the military – Nigeria, Sierra Leone and The Gambia – had their membership suspended. The fact that they were not actually expelled, but suspended from official Commonwealth meetings, meant that Chief Anyaoku did not have to resign.

One aspect resulting from these decisions was that the Commonwealth, a voluntary grouping often dismissed as a club lacking cohesion, or any ability to follow up with its high-flown principles, had now established minimum requirements. A government could lose its membership. This was a sanction not available to a universal body such as the United Nations, or a regional body like the Organisation of American States, where membership has always been automatic. A voluntary club can be defined by its rules of membership.

But what did suspension really mean, either for governments or their citizens? The Commonwealth is neither a rich, aid-giving organisation, nor a military alliance. Suspended governments did not appear to lose much. They were no longer invited to ministerial meetings, or eligible for technical assistance. But as the years since 1995 have proven – seven governments have been through the suspension process<sup>6</sup> – governments did not like to be “CMAGed” and usually wanted to return to full membership as soon as possible. Suspension was an affront to their status, and became part of the evidence which could adversely affect their attraction to tourists and outside investors.

The arrival of CMAG as a rules committee helped change the way in which the Commonwealth was perceived internationally, even though it was clear that its Foreign Ministers tended to judge issues politically, rather than in exact human rights terms. The example of a Commonwealth which refused membership to military leaders inspired the Organisation of African Unity (OAU) to introduce a ban on military presidents attending OAU summits at Algiers, in 1999.

For human rights advocates, the arrival of CMAG provided a space for lobbying. CMAG has, on average, met at least twice a year and the CHRI has made regular submissions. Amnesty International, Human Rights Watch and national human rights NGOs have periodically made submissions. But three issues were left open after 1995. To what extent could CMAG be made more effective for human rights? How far could the Commonwealth move from its new definition as an association of democracies to being a promoter of the rights of its citizens? And what had been and would be the consequences for the citizens of Commonwealth countries whose governments were suspended from membership?

It was obvious that there are many grievous human rights abuses in countries under civilian rule, and also that Commonwealth governments found it easier to ban military coups than to intervene in an expanding discourse of rights where there is substantial international machinery. The Harare Declaration limited its commitment to “fundamental human rights.” But within this broad mandate, CMAG’s concern was largely with political rights and free elections. However, twice running in recent years, in 2003 and 2007, Commonwealth observer groups have described Nigerian elections as woefully inadequate but “democratic” Nigerian governments have not been suspended. Fiji, where Commodore Frank Bainimarama took power in a coup in 2006, was finally suspended from the Commonwealth in September 2009 over his refusal to call elections; this meant, for example, that its athletes and sports people became ineligible to compete in the Commonwealth Games, New Delhi in October 2010. The Bainimarama military regime had also been suspended from the Pacific Islands’ Forum of South Pacific governments in May 2009. Interestingly the Forum had been influenced by the Commonwealth in adopting an increasingly hostile position towards military coups, including the setting up of its own Ministerial Action Group at its Biketawa meeting in 2000.

The Secretariat’s HRU over the last 15 years has focused on training civil servants and police, on promoting national human rights institutions, and on ratifying international conventions and covenants. It has continued to stay clear of any process of investigation in member countries. In the last two years, led by Dr Purna Sen who joined the Secretariat from Amnesty, it has published: best practice advice for governments and others on the Universal Periodic Review of human rights situations; a status report on human rights in member states; and reports on the rights of the child and the rights of disabled persons. But it has been unable to move into areas such as gay rights, and the rights of indigenous peoples, which are regarded as sensitive issues in member states.

Nonetheless, since 1995, NGOs have been pushing for a broader human rights mandate for CMAG, while some governments have wanted to rein CMAG back. This push-and-pull meant that, after 1999, the leaders agreed to a slow process for CMAG intervention – except in the case of military coups; CMAG would only come into play after the Secretary-General had tried his good offices services, and consulted regional neighbours. A nongovernmental proposal for a Human Rights Adviser to CMAG was not given serious consideration.

However, Secretary-General Don McKinnon, a New Zealander who was the vice-chairman of CMAG from 1995-9, required the HRU to provide him with advice to use in briefing CMAG. He told the Commonwealth Human Rights Forum in 2005 that only governments which had already signed key UN covenants and conventions should be admitted to the Commonwealth in future.

The worsening political, economic and human rights situation in Zimbabwe led to the suspension of President Mugabe’s civilian regime in 2003. Although highly contentious, for the Zimbabwe government argued that this was outside CMAG’s mandate and its African allies suggested that this was unfair and reflected British pressure, it was a breakthrough. It meant that egregious human rights abuse by a civilian government could also lead to the loss of Commonwealth

membership. The fact that the Mugabe regime then withdrew in protest did not alter the significance of the precedent.

The difficulty in using the drastic weapon of suspension is that it does little to promote human rights directly, and once a government is suspended, the Commonwealth's day-to-day influence is reduced. The Commonwealth's long and somewhat ineffectual engagement with Cameroon has illustrated some of these problems. Cameroon, most of which was a French colony prior to independence, joined the Commonwealth in 1995. Prior to that, a Commonwealth mission, led by Dr. Kamal Hossain of Bangladesh, had warned that Cameroon was a semi-dictatorial regime with a dominant party and long-serving president, President Biya. Cameroon was admitted to membership on the condition that there would be political and human rights improvements. But in spite of the efforts of senior Commonwealth representatives, and training workshops of various types, Cameroon still does not represent Commonwealth values and President Biya remains in power, 15 years after his country joined.

The benefit to citizens of these official Commonwealth efforts may not seem great, especially when a government has been suspended. During the 30 years that white-ruled South Africa was outside the Commonwealth there were considerable efforts, by Commonwealth governments and NGOs, to provide support and opportunities for the black majority. Putting in place such pressure, for the citizens of a country like Fiji where a government has been suspended, depends on countries' initiatives. It is only in the last year, as a result of pressure from NGOs, that a London-based committee of Commonwealth bodies has received funding from the Commonwealth Foundation to provide support for civil society in Zimbabwe. While the doctrine that the Commonwealth is an association of peoples as well as states has developed, it is not always put into practice. Indeed, the small Commonwealth Foundation, funded by governments to work for civil society, professional interaction and the arts, had earlier been ordered not to assist persons and organisations from a suspended Zimbabwe.<sup>7</sup>

There is also a risk that the sanction of membership suspension may lose its power if used too often. The question arises most sharply with Pakistan, which has the second largest population of Commonwealth countries, and a history of military dominance. It left the Commonwealth for 17 years after other members recognised the independence of Bangladesh – formerly East Pakistan – in 1972; ten years after its return, it was suspended again after General Musharref's military coup in 1999; it was allowed to return in 2002 after elections; and it was suspended again after Musharref's second coup in 2007, being allowed back seven months later. Many observers thought that Musharref, who was still both president and active commander-in-chief of the Army, had been allowed to re-enter too early in 2002 as a by-product of his support for the US-led "war on terror."

Nonetheless, the official Commonwealth is still bound to the Harare Principles, even if their application remains unsatisfactory. The Kampala summit, in November 2007, adopted rules for the admission of new member states which, among other things, require them to be compliant with the Harare Principles. An investigation process led by the Commonwealth Secretariat and consultation

with existing members, has to be completed before a new government can join. Compared with the European Union, whose accession conditions require changes to legislation guaranteeing the rights of minorities and other human rights, this process has been dangerously unspecific, as seen in the Rwanda case.

The issue was highlighted when, in November 2009, Rwanda joined the Commonwealth. Rwanda, a Francophone country, had no previous constitutional link to Britain or any existing Commonwealth member. It entered under a procedure of “exceptions” introduced in 2007, almost certainly to pave the way for Rwanda’s admission. This “exceptional” procedure gave significance to the interests of Commonwealth neighbours; it would have given retrospective support to the admission in 1995 of Mozambique, a former Portuguese territory, whose Commonwealth neighbours in the Southern African Development Community had at the time been keen for Mozambique to join. President Museveni of Uganda had made no secret of his desire to see his neighbour Rwanda as a member, a country which now belongs to the East African Community and which is ruled by an English-speaking elite very hostile to France, as a result of events during the genocide. President Kagame of Rwanda had actually been a commander in Museveni’s National Resistance Army which had won power in Uganda after a prolonged bush war. The United Kingdom was also keen to have Rwanda in the Commonwealth, in the belief that it would help consolidate a post-genocide democracy with development, but partly also out of support for Museveni and ancient francophobe prejudice.

But the process to verify whether or not Rwanda complied with the Harare Principles, was hardly thorough or transparent. It is understood that the Commonwealth Secretariat sent two missions, one from its political division and one from the HRU, before the Secretary-General himself visited Kigali and wrote to all governments recommending admission. The political mission, impressed by reconstruction after the genocide, supported entry. The HRU group pointed out that there were still government controls on media, civil society and freedom of association that did not match the Harare commitments. Neither report was made public.

There were also two other inquiries. The CHRI requested Professor Yash Ghai, a Kenyan, to determine in 2009 whether Rwanda met the Harare requirements. His report concluded that Rwanda’s admission to the Commonwealth would be premature, for human rights guarantees were not yet adequate. The UK branch of the Commonwealth Parliamentary Association – which is somewhat autonomous from the worldwide Commonwealth Parliamentary Association – sent a group of British parliamentarians, which recommended that Rwanda should join. However both the main political parties in the UK, Labour and Conservatives, were already committed to Rwanda’s entry.

The case seemed to illustrate that political considerations can override the formal human rights commitments of the Commonwealth. The issue may arise again if South Sudan declares independence, following the scheduled referendum in 2011, and applies to join the Commonwealth. It could also apply to Zimbabwe if it wishes to rejoin.

The issue of “realpolitik” versus its human rights commitments will continue to dog the Commonwealth. This is coming to the fore again in attempts to give CMAG a tougher mandate. At Port of Spain in 2009, Commonwealth leaders asked the Foreign Ministers on CMAG to review its terms of reference with a view to strengthening its capacity to “deal with the full range of serious or persistent violations of the Harare Principles.” Dissatisfaction with CMAG’s limited remit had grown, and came to a head in 2008-9 when Sri Lanka, despite serious allegations of widespread violations of human rights and humanitarian law, continued to sit as a member for a third two year term, which broke the two terms rule adopted at Durban in 1999.

In Durban, in fact, the leaders had come near to accepting a proposal from the then Secretary-General, Chief Anyaoku of Nigeria, which would have introduced relatively objective criteria for CMAG action to deal with errant governments: postponement of an election; interference with the judiciary and rule of law; and government control of the media. But the proposal was baulked at unexpectedly by two Caribbean Prime Ministers, arguing against a possible infringement of national sovereignty, and the chance was lost.

The current review by CMAG may well produce proposals to strengthen the Group’s mandate, but it suffers from the weakness that the governments currently on CMAG are notably more liberal than the Commonwealth’s membership as a whole, since all governments must agree to any changes.

## **2 The Commonwealth Human Rights Initiative and the nongovernmental Commonwealth**

The Commonwealth is different from other international associations in that it is underpinned by a large range of unofficial or semi-official organisations with “Commonwealth” in their title. Definitions vary, but there are now between 60 and 80 of them. Several, such as the Commonwealth Parliamentary Association and the Commonwealth Press Union, were founded during the British Empire and predate the Commonwealth Secretariat by half a century. The Commonwealth Foundation assisted a number of professional bodies into existence, such as the Commonwealth Lawyers Association and the Commonwealth Journalists Association, in the 1970s and 1980s. Important new ones started recently, such as the Commonwealth Human Rights Initiative or CHRI (1987), and the Commonwealth Business Council (1977) and Commonwealth Local Government Forum (1995).

The nature of these bodies varies. Some are umbrella organisations of national societies, while others have an individual membership. Some, like the Conference of Commonwealth Meteorologists which has been gathering at regular intervals since the 1920s, are meeting-based, with modest capacity between their conferences. They arrange international meetings, often of high quality, but do not have the staff or resources to conduct ongoing programmes or activities. Some, like the Commonwealth Organisation for Social Work, remain entirely voluntary. Many have financial problems, servicing a membership which is overwhelmingly in the poorer developing world.



No account of the Commonwealth role for human rights would be complete without a description of the CHRI. The germ for this initiative came from a residential conference at Cumberland Lodge, in the UK, in early 1987. At the time, the Thatcher Government in the UK was in a minority in the Commonwealth in trying to block pressure on the apartheid regime in South Africa, and the previous year there had been a significant Afro-Asian boycott of the Commonwealth Games in Edinburgh. As referred to above, human rights enthusiasts also recognised that the situation in several member states was not easy to defend, and South Africa's apologists had been exploiting this weakness.

Human rights supporters in the Commonwealth never supposed that there were rights peculiar to the Commonwealth: they just wanted internationally and constitutionally recognised rights to protect citizens in all member states. Further, they saw that features which unite nearly all the members could be used to their advantage: common law, parliamentary systems, similar approaches to administration and education, and the use of the English language. Commonwealth characteristics could be used as vehicles for the enhanced promotion and protection of rights, both civil and political and economic, social and cultural, as well as third generation development and green rights.

During the course of 1987, there were two exploratory meetings in London, involving NGOs and representatives of a handful of diplomats and the Commonwealth Secretariat.<sup>8</sup> Inspired by the "Eminent Persons Group" mission to South Africa it was agreed to set up an international study group, subsequently chaired by Flora MacDonald, former Foreign Minister of Canada, to conduct a survey of the human rights picture in the Commonwealth.<sup>9</sup> Three bodies – the Commonwealth Journalists Association, the Commonwealth Lawyers Association and the Commonwealth Trade Union Council – made a call to the Vancouver Commonwealth summit of 1987 for a new initiative for human rights. When the summit failed to respond, these three organisations, soon joined by the Commonwealth Legal Education Association and the Commonwealth Medical Association, decided to set up the CHRI as an ad hoc nongovernmental initiative.

The MacDonald group produced a survey report, "Put our world to rights" prior to the Harare summit of 1991 (MACDONALD, 1991). It set out eight priority areas for improving human rights in the Commonwealth – detention, freedom of expression and information, indigenous and tribal peoples, refugees, women, children, workers and trade unions, and the environment. The editor was the widely respected Professor Yash Ghai, then a law professor at the University of Hong Kong.<sup>10</sup>

The CHRI achieved considerable publicity for its campaign, and worked with three Southern African organisations in a three day African human rights conference which just preceded the summit of leaders in Harare. In the summit itself Bob Hawke, then Australian Prime Minister, brandished a copy of "Put our world to rights" and asked fellow leaders what they intended to do about it. However, as recounted earlier, the summit failed to respond to the three main demands of the CHRI – that there should be a special Commonwealth declaration for human rights, an independent commission, and a significant

human rights budget. Campaigners in Harare were not only disappointed with the Commonwealth communiqué, they feared that leaders would forget what it contained the moment they boarded the plane home.

What happened next helps to explain why the Commonwealth has become, in spite of its weaknesses, an interregional force for human rights. After due consultation, the bodies supporting the CHRI decided to institutionalise it as a permanent body, and to move its head office to New Delhi, India. Having failed to win the official commission it sought, the CHRI set up an Advisory Commission of its own, led by persons of status – successively Dr Kamal Hossain of Bangladesh, Senator Margaret Reynolds of Australia, and Sam Okudzeto of Ghana.

It has published a human rights report for the Commonwealth prior to every summit since 1993, covering a wide range of issues – cultural diversity and freedom of expression, the spread of light weapons, poverty as a human rights abuse, policing, and the dangerous impact of the “war on terror” on civil liberties. The CHRI now has small offices in Accra and London in addition to its head office in New Delhi, and remains unusual in being one of the few international human rights NGOs based in the global South. Its total staff is around 50 and its Director, Mrs Maja Daruwala, is well-known internationally and has served on the board of the Minority Rights Group and the civil society advisory committee of the Commonwealth Foundation.

The CHRI has also published a critique of Commonwealth states’ performance under the universal periodic review mechanism of the UN Human Rights Council “Easier Said than Done”, (CHOGM, 2008). This compared commitments and performances of 13 member states at the start of the new process: Bangladesh, Cameroon, Canada, Ghana, India, Malaysia, Mauritius, Nigeria, Pakistan, South Africa, Sri Lanka, United Kingdom and Zambia. The report warned that human rights defenders remain vulnerable to impunity and “also highlight once again the need for the Commonwealth to have mechanisms to monitor the progress of human rights’ compliance as a means of indicating their commitment to the association.” (CHOGM 2008, p. 127).

The CHRI has also sought to deepen commitment to human rights in the Commonwealth, by bringing together civil society groups in member countries. It runs an electronic Commonwealth Human Rights Network, serving a list of over 350, and since the Abuja summit of 2003 it has run three Commonwealth Human Rights Fora for civil society; the one in Kampala was attended by over 100 people.<sup>11</sup> However, at Port of Spain, in 2009, the forum was co-opted into the Commonwealth People’s Forum, a much larger event coordinated by the Commonwealth Foundation. The CHRI was dissatisfied with this because it considered that its issues risked being lost in a lengthy compendium statement. Subject to funding, it may revert to running its own stand-alone Human Rights Forum. Although now largely separate from the Commonwealth bodies which gave it birth, and without an individual membership, the CHRI has achieved financial stability on the basis of project funding.

In moving to India, the CHRI had to find credibility in the Commonwealth’s largest country, but it also had to maintain its advocacy towards the

intergovernmental Commonwealth. UK-based Commonwealth bodies rarely focus much of their work on the UK itself; this is justified in terms of the greater needs of developing countries, though reflecting a post-colonial world view and the weak public support for all things Commonwealth in the contemporary UK.

However, an India-based CHRI could not limit itself to international advocacy. It had to justify its existence in such a populous country, which already had well-established human rights organisations before the CHRI arrived in 1993. What the CHRI has therefore done is to ally itself with Indian bodies to campaign in certain areas – especially for access to information, and better, accountable policing – where it could draw on information from other Commonwealth countries and its own lobbying power. It has been particularly important in the coalition which persuaded the Indian government to replace a weak 2002 Freedom of Information Act with a much more robust Right to Information Act, 2005.<sup>12</sup> As an international NGO based in India, it was also able to carry out dangerous human rights observation duties in the state of Gujarat, following widespread murders and intimidation of the Muslim community.

The CHRI has continued to carry out programmes elsewhere, particularly in Africa, as well as advocacy towards the Commonwealth, and several governments including India's. Its persistence is a reason why the Commonwealth has come to have more salience for rights. As soon as the Harare Declaration was announced in 1991, the CHRI began pressing for serious implementation. Four years later it sent a fact-finding group to Nigeria, which published a damning account of human rights abuse under the military dictatorship – “Nigeria – stolen by generals”.<sup>13</sup> Importantly, each section of this report was headed by a related excerpt from the Harare Declaration. Every government had a copy at the time of the Auckland summit in 1995, and it provided a context for the rapid adoption of CMAG, and the first rules to enforce the Harare Principles.

The CHRI also played a key part in persuading the Abuja summit in 2003 to endorse legislation for freedom of information – something which now applies in nearly half of member states. But it is not the only nongovernmental force for human rights in the Commonwealth. After a long struggle, Commonwealth bodies concerned with freedom of expression, supported by the CHRI, won a commitment at the Coolum summit in Australia in 2002. In Abuja, a coalition of the Commonwealth Parliamentary Association, Commonwealth Lawyers Association and Commonwealth Magistrates and Judges Association won leaders' recognition for what were known as Latimer House Principles – the proper spheres for executive, legislature and judiciary.<sup>14</sup> At Kampala in 2007 it was clear that disability rights too were getting a major push forward in the nongovernmental Peoples Forum, and there has been a growing pressure to recognise gay rights, which are still criminalised in most of Commonwealth Africa, with the notable exception of South Africa.<sup>15</sup>

To what extent do decisions by Commonwealth leaders get followed up by all member governments, given that the official Commonwealth has no coercive power over states apart from suspension, and the Commonwealth Secretariat itself is small?<sup>16</sup> In human rights also, most governments are party to significant regional

instruments such as the European Convention, the African Peoples and Human Rights arrangements, and the Inter-American system. It was striking in 1995 that, after the military regime in Nigeria had been suspended at the Commonwealth summit in Auckland, an attempt by New Zealand at the UN to lead a criticism of the Ogoni executions was blocked by the African group, with the support of Commonwealth members. A similar attempt was made in the International Labour Organisation. Once again, regional solidarity trumped Commonwealth commitments.

Hence the follow-up varies considerably. But it is facilitated by the wide range of Commonwealth interaction, use of English, and the significance of common law. At one level the Commonwealth can be seen as a continuous debate. In the field of human rights, this debate occurs between leaders and their officials; Law Ministers; the biennial Commonwealth Human Rights Forum; major conferences around the world for the Commonwealth Lawyers (their biennial conference brings together over a thousand lawyers), law professors, and magistrates and judges; and a new gathering for national human rights institutions, inaugurated by the Commonwealth Secretariat in 2007. These discussions and exchanges result in action, though not always quickly. A good example of this is the gradual spread of Freedom of Information laws, which were endorsed by Commonwealth Heads at Abuja in 2003 as mentioned above, and have been backed up by a model bill supplied by the Commonwealth Secretariat.

A continuing thread in nongovernmental analysis is one of disappointment – that the fine words of Commonwealth leaders in successive declarations do not immediately benefit citizens. The CHRI and its friends are currently fighting to improve the accountability and quality of policing throughout the Commonwealth. In an association which has no military aspect, and which is pledged to democracy, the police are crucial for good governance, and the protection of citizens and their rights. It is a field in which the CHRI and Commonwealth Policy Studies Unit have made reports, and the Commonwealth Secretariat's HRU has carried out police training.

In 2005 and again in 2007 the Commonwealth Human Rights Forum and the Commonwealth Peoples Forum were calling for a Commonwealth Expert Group on the Future of Policing. The device of an expert group, convened by the Commonwealth Secretary-General, has been successfully used for development, environmental and social issues. It allows the Commonwealth to pool its brains, build consensus, and supply evidence and recommendations for subsequent political action.<sup>17</sup> Due to financial constraints the expert group device, energetically used during the era of Shridath Ramphal as Secretary-General (1975-90) has fallen into disuse in the last two decades.

An expert group on policing could have almost too many things to consider. It could consider traditional problems of accountability, corruption, political neutrality and poor performance. It could also consider problems of unsuitable or outdated legislation, cybercrime and the challenge of globalisation, how best to achieve inclusive, community policing, and relations between police and public. Human rights NGOs could provide support and information for such a group.

But so far the nongovernmental community has yet to succeed in persuading

governments to look at the strategic question of policing in the 21<sup>st</sup> century. There is an opportunity here for the Commonwealth, but as Shridath Ramphal said recently, “We have to persuade governments to use the Commonwealth”.<sup>18</sup> The Commonwealth is a voluntary body and an option, not a treaty-based set of obligations.

What the Commonwealth can do for human rights also depends on the international context, and the personalities at its head. At Kampala, the leaders elected Kamallesh Sharma, an Indian diplomat who had been the UN representative in East Timor, as its fifth Secretary-General. His four year term began in April 2008. He has spoken imaginatively of the Commonwealth as a series of overlapping networks, well-adapted to globalisation. But he has not been outspoken on human rights, referring to the need for the Secretariat to give governments a helping hand rather than a pointing finger. India was one of the countries to stall an attempt to strengthen CMAG in 1999, and on a number of issues – The Gambia, Sri Lanka for instance – his voice has lacked public impact. When he has pushed forward, it has been on traditional lines, by creating a Commonwealth association of election management bodies, designed to raise electoral standards through peer group pressure.

As someone who has worked with the UN, and is aware of how the Commonwealth is seen through other international eyes, he has invested time in trying to link the Commonwealth with other processes. Hence he arranged a meeting in London in 2008 on international institutional reform, particularly in the financial sphere. Unfortunately, this has only had a behind-the-scenes influence, if that, on efforts to combat the global financial crisis that developed after the collapse of Lehman Brothers bank.

At the Port of Spain summit, in November 2009, he made a brave attempt to contribute to the debate on climate change and the environment, only a few days ahead of the upcoming Copenhagen summit. The UN Secretary-General, President Sarkozy and Mr Rasmussen, the Danish Prime Minister who chaired at Copenhagen, all came to Trinidad to speak to the Commonwealth leaders. One result was that far more leaders attended the Copenhagen gathering than would otherwise have gone, and two specific ideas – for a climate adaptation fund, and specific help for vulnerable small states – were successfully launched. However Mr Sharma himself did not go on to Copenhagen, where Commonwealth states were split according to national interest. Compared to bodies like the World Bank, or specialist agencies of the UN, the Commonwealth Secretariat has very limited human and financial resources to pursue its agendas.

### 3 Conclusion

Unexpectedly, in a post-colonial association, the Commonwealth is making a contribution in human rights. This is not an area of significant activity for *‘la Francophonie’*, the post-colonial French body which is now numerically larger but less coherent than the Commonwealth. The Commonwealth involvement has been driven chiefly by nongovernmental and media interests, and the residue of empire and common law – concerns about racism, development rights, and that

newly independent polities should expand rather than restrict civil liberties. New ideas for incorporating socioeconomic rights, from India and South Africa, have travelled round the Commonwealth. The organic and multilayered nature of the Commonwealth is facilitating change. But the weak commitment of governments, and the small resources available to the intergovernmental institutions, are likely to mean that civil society remains dissatisfied: the potential for Commonwealth cooperation in human rights, as elsewhere, will continue to be vaster than anything that is actually achieved. Nongovernmental bodies are themselves having to take on more responsibility. These issues are likely to be explored further in an Eminent Persons Group, set up after the Port of Spain summit, which is designed to chart new courses for the Commonwealth, with greater cooperation between its governmental and non-governmental elements. One example of such cooperation is the recently established Ramphal Commission on Migration and Development, being chaired by P J Patterson, the former Prime Minister of Jamaica, which is independent of the Secretariat but focused on the Commonwealth, and which has received funding from both the Secretariat and Foundation.<sup>19</sup>

It is possible that political changes in the UK may assist the Commonwealth to achieve more significance, including in its work for human rights. As a result of a decision at Port of Spain the UK budgetary contribution to the Secretariat was raised from 30 per cent to 31.4 per cent. The new coalition government, which emerged after an indecisive election in May 2010, has two prominent members (Vince Cable a Liberal Democrat, and Lord Howell, a Conservative) who have up-to-date views on the Commonwealth and its potential. Stronger support from the UK, coupled with heavier Indian involvement, could help the association to make a stronger global impact.

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## NOTES

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1. Rwanda joined the Commonwealth at the Port of Spain summit in November 2009; the Fiji Islands, were suspended from full membership in 2009 as a result of a military takeover which breached the Harare Principles described in this article, and their sporting team was prevented from competing in the 2010 Commonwealth Games in New Delhi. Until 2003 there had also been 54 member states but soon after the Abuja Commonwealth summit the Mugabe regime in Zimbabwe walked out, because of severe criticism of its human rights record.
2. The key date for transformation into the Commonwealth was 1949, when the London Declaration accepted independent India, as a republic; this began the process by which the Commonwealth became a multiracial international body, the majority of whose members are republics, no longer controlled by the United Kingdom.
3. In the early 1970s the leaders adopted the practice of a "Retreat", where they met on their own without officials and Foreign Ministers, for intimate and problem-solving diplomacy. This tactic, made easier by the fact that they all converse in English, has since been adopted by other international organisations.
4. The Commonwealth played a leading role in the international community in marshalling opposition to white South Africa, and sent an "Eminent Persons Group" in 1986 which sought a negotiated end to apartheid. In the 1980s it was consistently promoting debt write-off for the poorest countries, which resulted in the HIPC (highly indebted poor countries) initiative of the 1990s.
5. One party states – as in Tanzania, Zambia and Malawi – were commonplace. Both Nigeria and Ghana had military regimes.
6. In alphabetical order: Fiji Islands, Gambia, Ghana, Nigeria, Pakistan, Sierra Leone and Zimbabwe.
7. The Foundation, based like the Secretariat in London, only has a budget of some £4M a year.
8. Among those represented were Amnesty International, Survival International and the Canadian High Commission.
9. The Eminent Persons Group was led by the former president of Nigeria, Olusegun Obasanjo and the former prime minister of Australia, Malcolm Fraser. It aimed to find a negotiated end to apartheid and met Nelson Mandela in prison. It had to cut short its mission after the South African military bombed three neighbouring Commonwealth states.
10. Yash Ghai, a Kenyan, is probably the leading constitutional lawyer in the Commonwealth, having worked on constitutional reform in several states, including Kenya and Fiji. He is currently a constitutional adviser in Nepal, and a UN rapporteur in Cambodia.
11. The Human Rights Forum is organised by the CHRI with support from other bodies.
12. Dr Nida Kirmani has researched the Indian campaign for Right to Information, and the role of CHRI, as part of a study funded by the Economic and Social Research Council, UK (contact: nidkirm@yahoo.com).
13. The team consisted of Flora MacDonald from Canada, Enoch Dumbutshena from Zimbabwe, and Neville Linton from Trinidad and Tobago.
14. These principles, covering the separation of powers, have had an impact on the UK itself where law lords, an appellate body, are to be excluded from the second legislative chamber, the House of Lords. Several countries have had to look again at their mechanism for the appointment of judges, so that this is not a decision of the executive; one reason for the 2007 suspension of the Pakistan government from Commonwealth membership was President Musharraf's dismissal of judges who opposed him.
15. The post-apartheid constitution of South African guaranteed same-sex rights and President Zuma, himself in a polygamous marriage, spoke out strongly against the recent imprisonment of two Malawian males who sought a civil marriage.
16. Since 2000 the total staff of the Secretariat has been around 270-280.
17. Debt write-off for poor developing states was originally proposed by an Expert Group in the early 1980s chaired by Harold Lever.
18. Shridath Ramphal, who was Secretary-General from 1975 to 1990, was speaking in London in 2006.
19. Other members are George Vassiliou, former President of Cyprus; Farooq Sobhan, former Foreign Secretary, Bangladesh; Will Day, Chairman of the Sustainable Development Commission, UK; Jill Iliffe, Executive Director, Commonwealth Nurses Federation; Professor John Ouko and Professor Brenda Yeoh.



## RESUMO

Existe alguma função para um mecanismo de promoção e proteção dos direitos humanos que não seja nem universal nem regional? O caso da Commonwealth of Nations, a qual se originou do Império Britânico, mas cujos membros, atualmente, são, em sua maioria, países em desenvolvimento, oferece uma visão de que isso seja possível tanto no nível intergovernamental quanto no não governamental. Este artigo foca o modo como as regras de associação à Commonwealth tiveram papel decisivo em sua definição como associação de democracias e, com mais cuidado, com compromisso com as garantias dos direitos humanos para seus cidadãos. O progresso foi desigual, dirigido por crises políticas e limitado pelos poucos recursos disponibilizados para um Secretariado intergovernamental. Ao mesmo tempo, a Iniciativa de Direitos Humanos da Commonwealth, um forte órgão não governamental, com sede em Nova Delhi e inicialmente lançado como uma coalizão de associações da Commonwealth sediadas em Londres, tem coordenado a pressão internacional sobre os governos da Comunidade para que cumpram suas declarações. Tem também executado programas próprios para o direito à informação e para a formação responsável de políticas.

## PALAVRAS-CHAVE

Commonwealth of Nations – Direitos humanos

## RESUMEN

¿Tiene algún papel que desempeñar una institución para la promoción y protección de los derechos humanos que no sea ni universal ni regional? El caso de la Commonwealth of Nations, que se originó en el Imperio Británico pero que en la actualidad se compone de Estados en su mayoría en desarrollo, permite explorar las posibilidades a nivel tanto intergubernamental como no gubernamental. El presente artículo analiza la forma en que sus reglas de membresía se han vuelto decisivas para definir a la Commonwealth of Nations como una asociación de democracias y, con más cautela, como una organización comprometida con la garantía de los derechos humanos de los ciudadanos. El avance ha sido desigual, impulsado por crisis políticas y limitado por los escasos recursos disponibles para su secretaría. El artículo describe también las actividades de la Iniciativa de Derechos Humanos del Commonwealth of Nations, una organización no gubernamental con sede en Nueva Delhi, que coordina la presión internacional para que los gobiernos cumplan sus compromisos.

## PALABRAS CLAVE

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